Sabah Medical Centre Sdn Bhd v Sykt Neptune Enterprise Sdn Bhd & Anor

HIGH COURT (KOTA KINABALU) — CASE NO KK-24–133 OF 2011
ABDUL RAHMAN SEBLI J
3 OCTOBER 2011

Arbitration — Arbitrator — Removal of — Application for — Biasness or lack of impartiality — Arbitrator delivered interim award — Whether grossly unfair for arbitrator to question bona fides of claim — Whether arbitrator had prefixed conclusions on bona fides of claims — Whether real danger or possibility of bias — Whether appropriate for second defendant to continue hearing and deciding dispute

This is an application by the plaintiff, Sabah Medical Centre Sdn Bhd ('SMC') for an order that the second defendant's appointment as arbitrator in the dispute between them and the first defendant be terminated with immediate effect. At the arbitration proceedings, the first defendant was the claimant and SMC, the respondent. The arbitrator had delivered his decision on the interim award, ruling, that SMC was to immediately pay the first defendant a sum of RM8,651,062.27 and was due to hear SMC's set off claims against the first defendant. In his rulings made in the course of the hearing and in his interim award, the arbitrator made it clear to the parties that: (i) SMC's set-off claim in respect of the liquidated and ascertained damages ('LAD') amounting to the sum of RM2,128,000 should be decided separately in the final award; (ii) SMC's set-off claim for the defects amounting to the sum of RM7,715,145.75 should also be decided separately in the final award. Basically, the grounds relied upon by the plaintiff for the removal of the arbitrator were that: (i) the plaintiff had lost confidence in the second defendant's ability to conduct the arbitration proceedings impartially and independently and that a fair and just hearing would not be possible; and (ii) the plaintiff had not been treated with equality nor given a fair opportunity to present its case, rendering a fair hearing of the dispute impossible.

Held, allowing the plaintiff's application:

(1) Obviously, the SMC's set off claims which are large would extinguish completely the interim award given in favour of the first defendant if SMC were to succeed in the final award. The SMC's fear was that the arbitrator would not be impartial or may be bias in determining the final award because the arbitrator had expressed certain opinion in respect of the LAD claim in his interim award. The arbitrator's adverse comments and conclusions that SMC's claim was 'inequitable' and questioning the

bona fides of the claim were all made in circumstances where evidence on the issue of LAD had yet to be adduced nor submissions made. SMC was understandably alarmed by these views, expressed as they were in such intemperate language, questioning the credibility and bona fides of SMC's claim. There was a real possibility that the arbitrator had already made up his mind against SMC on these issues in the final award. At the very least, there was a real possibility or danger that he would not be able to approach the issues with an open mind (see paras 7 & 10).

(2) The arbitrator's finding on the issue of defects further showed that he had already concluded that the first defendant had no liability to undertake defects repair works on the ground that the architect did not give the first defendant a deadline to do so. It was improper to make this kind of finding when evidence on the issue of defects was incomplete and submissions had yet to be made. As the evidence on a contested issue was still pending and submissions yet to be made, it was grossly unfair for the arbitrator to question the bona fides of SMC's claim. It was to pass judgment without having all the facts (see paras 11–12).

(3) In his interim award the arbitrator assured that he had not made up his mind on issues relating to the set off claims. This was cold comfort to SMC because by having those negative thoughts at the back of his mind, there was a real possibility that the arbitrator had prefixed his conclusions on the bona fides of SMC's claims. Such negative predisposition would be difficult to displace and SMC should not be put through a hearing, which appeared to be predetermined. It strikes at the very heart of the rule that no person shall be condemned unless given the opportunity of being heard (see para 13).

[Bahasa Malaysia summary

Ini adalah permohonan oleh plaintif, Sabah Medical Centre Sdn Bhd ('SMC') untuk perintah bahawa pelantikan defendan kedua sebagai penimbang tara dalam pertikaian di antara mereka dan defendan pertama dibatalkan serta merta. Dalam prosiding timbang tara, defendan pertama adalah pemohon dan SMC, responden. Penimbang tara telah memberikan keputusannya atas award interim, memutuskan bahawa SMC membayar segera kepada defendan pertama sejumlah RM8,651,062.27 dan akan mendengar tuntutan *set-off* SMC terhadap defendan pertama. Dalam keputusannya yang dibuat semasa perbicaraan dan dalam award interimnya, penimbang tara menjelaskan kepada pihak-pihak bahawa: (i) tuntutan *set-off* SMC berkaitan dengan ganti rugi jumlah tertentu (LAD) berjumlah RM2,128,000 mesti diputuskan secara berasingan di dalam award terakhir; (ii) tuntutan *set-off* SMC untuk kerosakan berjumlah RM7,715,145.75 mesti diputuskan secara berasingan di dalam award terakhir. Pada asasnya, alasan yang disandarkan oleh plaintif untuk penyingkiran penimbang tara adalah bahawa: (i) plaintif hilang keyakinan dalam kebolehan defendan kedua mengendalikan prosiding timbang tara

dengan adil dan bebas dan bahawa perbicaraan yang adil dan saksama tidak berkemungkinan; dan (ii) plaintif tidak dilayan secara saksama dan tidak diberikan peluang adil untuk mengemukakan kesnya, menjadikan perbicaraan secara adil pertikaian tersebut adalah mustahil.

Diputuskan, membenarkan permohonan plaintif:

(1) Jelas, tuntutan *set-off* SMC yang besar akan melenyapkan keseluruhan award interim yang diberikan memihak kepada defendan pertama jika SMC ingin berjaya dalam award terakhirnya. Ketakutan SMC bahawa penimbang tara tidak akan berlaku adil atau mungkin berat sebelah dalam menentukan award terakhir kerana penimbang tara telah memberikan pendapat tertentu berkaitan dengan tuntutan LAD dalam award interimnya. Ulasan bertentangan penimbang tara dan kesimpulan bahawa tuntutan SMC adalah 'inequitable' dan mempersoalkan bona fide tuntutan adalah kesemuanya dilakukan dalam keadaan di mana keterangan atas isu LAD masih belum dikemukakan dan tiada penghujahan dibuat. SMC jelas khuatir dengan pendapat-pendapat ini, yang diberikan kerana ia adalah dalam bahasa yang keterlaluan, mempersoalkan kebolehpercayaan dan bona fide tuntutan SMC. Terdapat kemungkinan sebenar bahawa penimbang tara telah memutuskan terhadap SMC dalam isu-isu ini dalam award terakhir. Sekurang-kurangnya, terdapat kemungkinan sebenar atau bahaya bahawa dia tidak boleh membuat pendekatan terhadap isu-isu tersebut dengan minda terbuka (lihat perenggan 7 & 10).

(2) Penemuan penimbang tara atas isu kecacatan selanjutnya menunjukkan bahawa dia telah pun memutuskan bahawa defendan pertama tidak mempunyai liabiliti untuk mengambil kerja-kerja membetulkan kecacatan atas alasan bahawa arkitek tersebut tidak memberikan defendan pertama tarikh akhir untuk berbuat demikian. Adalah tidak wajar untuk membuat penemuan sebegini apabila keterangan atas isu kecacatan tidak lengkap dan penghujahan belum dibuat. Oleh sebab keterangan atas isu yang dipertikaikan masih pending dan penghujahan belum dibuat, adalah amat tidak adil untuk penimbang tara mempersoalkan bona fide tuntutan SMC. Ia seperti meluluskan penghakiman tanpa kesemua fakta (lihat perenggan 11–12).

(3) Di dalam award interimnya penimbang tara menjamin bahawa dia tidak memutuskan atas isu-isu berkaitan tuntutan *set-off*. Ini tidak menyenangkan bagi SMC kerana dengan adanya pemikiran negatif sebegitu di dalam pandangannya, terdapat kemungkinan sebenar bahawa penimbang tara membuat keputusan awal atas bona fide tuntutan SMC. Kecenderungan awal yang negatif sebegitu sukar ditukar dan SMC tidak wajar melalui perbicaraan, yang jelas telah diputuskan

terlebih dahulu. Ia melanggar asas peraturan bahawa tidak ada seorang pun yang boleh dipersalahkan kecuali diberikan peluang untuk dibicarakan (lihat perenggan 13).]

Notes

For cases on arbitrator in general, see 1(1) *Mallal's Digest* (4th Ed 2011, Reissue) paras 1472–1537.

Cases referred to

Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd [1996] 2 MLJ 57, CA (refd)

Henderson v Henderson [1843] 3 Hare 300 (refd)

Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggunggan [1999] 3 MLJ 1, FC (refd)

Metramac Corporation Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (interveners) [2007] 5 MLJ 501, FC (refd)

R v Gough [1993] AC 646, HL (refd)

Ridge v Baldwin [1964] AC 40, HL (refd)

Secretary to the Government, Transport Department v Munuswamy Mudaliar AIR 1988 SC 2232 (refd)

Legislation referred to

Arbitration Act 2005 s 13(7)

Rules of the High Court 1980 O 42 r 8

Mohandass Kanagasabai (Sri Marina Tiu with him) (Yap Chin & Tiu) for the plaintiff.

Norbert Yapp (Norbert Yapp & Associates) for the first defendant.

Catherine Chau (Catherine Chau & Associates) for the second defendant.

Abdul Rahman Sebli J:

[1] This is an application by the plaintiff, Sabah Medical Centre Sdn Bhd ('SMC') for an order that the second defendant's appointment as arbitrator in the dispute between them and the first defendant be terminated with immediate effect. At the arbitration proceeding the first defendant was the claimant and SMC the respondent. The arbitrator has delivered his decision on the interim award, ruling that SMC is to immediately pay the first defendant a sum of RM8,651,062.27 and is due to hear SMC's set off claims against the first defendant. Basically the grounds relied upon for the removal of the arbitrator are these:

(a) the plaintiff has lost confidence in the second defendant's ability to

conduct the arbitration proceedings impartiallyand independently and that a fair and just hearing will not be possible; and

(b) the plaintiff has not been treated with equality and given a fair opportunity to present its case, rendering a fair hearing of the dispute impossible.

[2] Bias or lack of impartiality is a predisposition to decide for or against one party without proper regard to the true merits of the dispute: see *Secretary to the Government, Transport Department v Munuswamy Mudaliar AIR* 1988 SC 2232. The language and observations made by judges (and this includes arbitrators) may be a ground on which bias may be inferred: see the judgment of Richard Malanjum CJ (Sabah & Sarawak) in *Metramac Corporation Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (interveners)* [2007] 5 MLJ 501 (FC).

[3] The test for the discharge of an arbitrator is a 'real danger of bias' and the threshold is a low one — only a possibility needs to be shown, not a probability: see *R v Gough* [1993] AC 646; *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggunggan* [1999] 3 MLJ 1.

[4] Both written and oral submissions were made by the parties at the hearing. Having considered the arguments of both sides carefully I agree with SMC that there is a real danger or possibility (they mean the same thing) of bias on the part of the arbitrator. The arbitrator (second defendant) had rightly refrained from taking part in the arguments and leaving the matter to the court as he was the sitting arbitrator in the arbitration proceeding between SMC and the first defendant which was still ongoing as at the date of hearing. The submissions made on behalf of SMC shall form the basis of this judgment. The argument is as follows.

[5] In his rulings made in the course of the hearing and in his interim award, the arbitrator made it clear to the parties that:

(a) SMC's set-off claim in respect of the liquidated and ascertained damages (LAD) amounting to the sum of RM2,128,000 should be decided separately in the final award; and

(b) MC's set-off claim for the defects amounting to the sum of RM7,715,145.75 should also be decided separately in the final award.

[6] Obviously these are large claims which would extinguish completely the interim award given in favour of the first defendant if SMC were to succeed in

A the final award. SMC's fear is that the arbitrator will not be impartial or may be bias in determining the final award because he has expressed certain opinion about these claims in his interim award. In particular, in respect of the LAD claim the arbitrator made the following observations:

B (1) 'Since the Respondent admitted it is at fault in the delay in handing over site possession on Ph. 11, it would be inequitable to deduct LAD from the Claimant based on the Respondent's bare assertions' (para 271(a) of the interim award).

(2) 'What was the basis for the Architect only granting 25 days EOT when site possession for Ph.II works was delayed by 16 weeks?' (para 271(c) of the interim C award).

(3) 'Surely, if LAD was indeed due to the Respondent, why did the Respondent not begin to set-off and recover the LAD from the Interim Certificates 31, 32 and 33?' (para 271(e) of the interim award).

D **[7]** In respect of the claim on defects he made the following observations:

(1) 'Since the Claimant was terminated before the end of the DLP, the alleged defects will only be up to the date of termination as the Claimant will no longer have the ability to rectify the defects after vacating the site' (para 322 of the E interim award).

(2) 'What merely happened was that the Architect (RW1) compiled a list defects after the Claimant had left the site and introduced the various defects as evidence from the Respondent's Bundles. Further, it is clear that once the defect was discovered before the end of DLP, it was not referred to the Claimant after it left F the site. Thus, without a Defects List at the date of the Claimant's termination from the Architect, given to the Claimant and giving the Claimant a deadline to complete those defects, it does not establish that the claimant refused to undertake defects rectification works' (para 349(iii) of the interim award).

G **[8]** These comments should not have been made because the arbitrator himself had ruled that all evidence pertaining to the matter is to be heard in the final award. By these comments and observations SMC has reasonable grounds to conclude that:

H (a) the arbitrator has decided that it would be 'inequitable' to deduct the LAD. He has also concluded that SMC's LAD claim is a 'bare assertion' although supported by an architect's certificate of non-completion;

(b) by questioning the architect's basis for granting a 25 day extension, the I arbitrator does not believe that the architect's decision is a correct one; and

(c) the arbitrator is questioning the bona fides of the LAD claim when he said 'surely if LAD was indeed due to the Respondent why did the Respondent not begin to set-off LAD from Interim Certificates'.

[9] The arbitrator's adverse comments and conclusions that SMC's claim is 'inequitable' and questioning the bona fides of the claim were all made in circumstances where evidence on the issue of LAD has yet to be adduced and submissions made.

[10] SMC is understandably alarmed by these views, expressed as they were in such intemperate language, questioning the credibility and bona fides of SMC's claim. There is to my mind a real possibility that the arbitrator has already made up his mind against SMC on these issues in the final award. At the very least there is a real possibility or danger that he will not be able to approach the issues with an open mind.

[11] The arbitrator's finding on the issue of defects further shows that he has already concluded that the first defendant has no liability to undertake defects repair works on the ground that the architect did not give the first defendant a deadline to do so. It is improper to make this kind of finding when evidence on the issue of defects is incomplete and submissions have yet to be made.

[12] It was contended by counsel for the first defendant that the plaintiff should not complain about the arbitrator's comments and observations as it was the plaintiff themselves who raised the issue of set off extensively at the hearing before the arbitrator, making it necessary for the arbitrator to deal with the issue in coming to his decision on the interim award. The point is validly taken but where, as here, evidence on a contested issue is still pending and submissions have yet to be made, it is grossly unfair for the arbitrator to question the bona fides of SMC's claim. It is to pass judgment without having all the facts.

[13] In his interim award the arbitrator assures that he has not made up his mind on issues relating to the set off claims. This is cold comfort to SMC because by having those negative thoughts at the back of his mind, there is a real possibility that the arbitrator has prefixed his conclusions on the bona fides of SMC's claims. Such negative predisposition will be difficult to displace and SMC should not be put through a hearing which appears to be predetermined. It strikes at the very heart of the rule that no person shall be condemned unless given the opportunity of being heard: *Ridge v Baldwin* [1964] AC 40. In *Metramac*, the Federal Court held that language by a judge suggesting that careful consideration has been given does not preclude scrutiny of the judgment for bias.

[14] For reasons aforesaid I am of the view that it is wholly inappropriate for the second defendant to continue hearing and deciding the dispute between SMC and the first defendant. There is to my mind a real danger of bias on his

part. Accordingly the plaintiff's application was allowed in terms of the originating summons dated 27 June 2011.

[15] As a footnote I should perhaps mention that at the hearing of the application on 8 August 2011, no reference was made by any party to s 13(7) of the Arbitration Act 2005. It was only brought up later when the first defendant vide letter dated 9 August 2011 requested for an appointment pursuant to O 42 r 8 of the Rules of the High Court to 'correct' the order made in relation to prayer (two) of SMC's originating summons. In deference to the first defendant I granted the request and all parties were invited to present their arguments on 18 August 2011. SMC opposed the application and after hearing arguments from all three parties I declined the application principally on the ground that the point raised by the first defendant could and should have been argued at the hearing of the originating summons but was not. There must be finality in litigation: *Henderson v Henderson* [1843] 3 Hare 300; *Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd* [1996] 2 MLJ 57 (CA).

Plaintiff's application allowed.

Reported by Ashgar Ali Ali Mohamed